Supreme Court No. SC85627

IN THE SUPREME COURT OF MISSOURI

JEFFREY L. LAGUD,

Respondent,

v.

KANSAS CITY, MISSOURI BOARD OF POLICE COMMISSIONERS, *et al*

Appellants.

Appeal From The Missouri Court Of Appeals, Western District

SUBSTITUTE APPELLATE BRIEF OF APPELLANTS

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JURISDICTIONAL STATEMENT

Appellants, Dennis C. Eckold, Dr. Stacey Daniels-Young and Karl Zobrist, in their official capacities as members of the Board of Police Commissioners of Kansas City, Missouri (Board), agree that this Court has jurisdiction of this matter as suggested by Respondent Jeffrey L. Lagud (Lagud) but suggest that Lagud is incorrect in his statement that Board convened to review the termination of Lagud or that Board reversed the termination of Lagud.

While these issues are not jurisdictional, as will be discussed below, they do incorrectly set the stage for what took place in connection with this litigation.

STATEMENT OF FACTS

While Board agrees with some of the facts set out by Lagud in his Statement of Facts, Board does not believe the Statement of Facts set out by Lagud is overall a fair and concise statement of the facts relevant to the two questions presented for determination, without argument, as required by Rule 84.04(c) of the Rules of Civil Procedure and therefore Board elects to set out its own brief Statement of Facts.

On September 10, 2000 Police Officer James Carmody (Carmody) was on duty as a police officer with the Kansas City, Missouri Police Department (L.F. 283-284) when he came in contact with James K. Russell (Russell) at 40th and Central, Kansas City, Missouri (L.F. 283). At that time, Carmody was a partner with Police Officer Jason R. Crump (Crump) who assisted Carmody in ultimately arresting Russell (L.F. 363). Russell was arrested for driving under the influence and was transported to center zone by a patrol wagon (L.F. 284).

At center zone, Carmody requested the assistance of a drug recognition officer and Lagud and another officer arrived (L.F. 285-286). When Lagud arrived, Russell was still handcuffed and was sitting in a chair just outside of a holding cell (L.F. 285). While Carmody was present, Lagud did a series of tests on Russell, which included taking vital signs such as pulse, temperature, blood pressure and pupil size (L.F. 286). Lagud requested that Russell provide a urine sample, which was taken at one of the holding cells at center zone (L.F. 287).

Carmody was holding Russell by holding the handcuffs, which had Russell's hands cuffed behind his back. Russell was taken into the holding cell where the urinal was located (L.F. 290). Russell was dressed in clothing at this time (L.F. 290). When the urine test started, Carmody positioned himself where he could see the front of Russell (L.F. 292). Carmody observed Lagud holding Russell's penis while Russell was urinating into a cup that Lagud was holding (L.F. 292). Russell confirmed that the officer giving the urine test touched his penis (L.F. 339).

Lagud said that he did not touch the penis of Russell (L.F. 488).

Following the incident, a Personnel Incident Report was prepared by the Kansas City, Missouri Police Department wherein Lagud was charged with allegations of misconduct (L.F. 2). Subsequently, Chief of Police Richard D. Easley (Easley) filed Charges and Specifications with the Board of Police Commissioners wherein Easley recommended the termination of Lagud as a police department employee as allowed by Section 84.600 of the Revised Statutes of Missouri (L.F. 8-9 and L.F. 418).

In the Charges and Specifications, Lagud was charged, in Count I, with grabbing and holding the penis of an arrest in violation of the policies of the Kansas City, Missouri Police Department and, in Count II, with denying physical contact with the arrest in violation of the policies of the Kansas City, Missouri Police Department (L.F. 9-10). A hearing before Board on the Charges and Specifications was commenced on April 16, 2001 (L.F.263).

During the hearing, Russell was called as a witness and at one point during cross-examination, counsel for Lagud asked Russell, "Were you taking GHB on the night of September 10, 2000?" (L.F. 343). An objection was made to the question on the basis that the answer could incriminate Russell (L.F. 343). The Board determined that the question was not relevant and that Russell had asserted his Fifth Amendment privilege (L.F. 345). After that ruling, Lagud continued to question Russell on the events of September 10, 2000 (L.F. 346-361). Lagud has acknowledged that he already knew that Russell had admitted to police that he had ingested GHB on September 10, 2000 (Substitute Appellate Brief of Respondent Jeffrey L. Lagud, p.5). In fact, Carmody earlier had testified that Russell had admitted that he was on a date rape drug (L.F. 303).

Following the hearing, Board issued its Findings Of Fact, Conclusions Of Law And Order wherein it suspended Lagud without pay from January 30, 2001 until September 10, 2001 (L.F. 636-640).

POINTS RELIED UPON

I. BOARD DID NOT ERR IN THE HEARING OF THIS MATTER WHEN BOARD SUSTAINED THE OBJECTION TO THE QUESTION INVOLVING WITNESS RUSSELL TAKING GHB ON SEPTEMBER 10, 2000 FOR THE REASON THAT SAID QUESTION WAS NOT RELEVANT AND FOR THE FURTHER REASON THAT THERE WAS NO PREJUDICE TO LAGUD IN ALLOWING RUSSELL TO EXERCISE HIS RIGHTS UNDER THE FIFTH AMENDMENT ON A LIMITED BASIS.

United States v. Brierly, 501 F.2d 1024, 1027 (8th Cir. 1974)

State of Missouri v. Blair, 638 S.W.2d 739, 754 (Mo. 1982)

State of Missouri v. Brown, 549 S.W.2d 336, 341 (Mo. banc 1977)

II. BOARD DID NOT ERR IN FINDING CREDIBILITY OF WITNESSES AGAINST LAGUD FOR THE REASON THAT THE ISSUE OF CREDIBILITY IS ONE FOR OF BOARD AND FOR THE FURTHER REASON THAT THIS COURT REVIEWS THE DECISION OF BOARD AND NOT THE DECISION OF THE MISSOURI COURT OF APPEALS.

Section 536.140.3 of the Revised Statutes of Missouri.

Morton v. Missouri Air Conservation Com'n, 944 S.W.2d 231, 236 (Mo. App. S.D. 1997).

ARGUMENT

Point I

I. BOARD DID NOT ERR IN THE HEARING OF THIS MATTER WHEN BOARD SUSTAINED THE OBJECTION TO THE QUESTION INVOLVING WITNESS RUSSELL TAKING GHB ON SEPTEMBER 10, 2000 FOR THE REASON THAT SAID QUESTION WAS NOT RELEVANT AND FOR THE FURTHER REASON THAT THERE WAS NO PREJUDICE TO LAGUD IN ALLOWING RUSSELL TO EXERCISE HIS RIGHTS UNDER THE FIFTH AMENDMENT ON A LIMITED BASIS.

A. Standard of Review.

The standard of review by this Court is a review of the findings of fact and decision of the agency, not the judgment of the Circuit Court. *Morton v. Missouri Air Conservation Com'n*, 944 S.W.2d 231, 236 (Mo. App. S.D. 1997). In reviewing an administrative agency decision, the evidence is viewed in its entirety together with all the legitimate inferences therefrom in a light most favorable to the agency. *Jones v. City of Jennings*, 23 S.W.3d 801, 803 (Mo. E.D. 2000). *Graves v. City of Joplin*, 48 S.W.3d 121, 124 (Mo. App. S.D. 2001). The review is controlled by Section 536.140.2 of the Revised Statutes of Missouri.

Under the provisions of Section 536.140.2 of the Revised Statutes of Missouri, the inquiry of the Court may extend to a determination of whether the action of the agency,

(1) Is in violation of constitutional provisions;

(2) Is in excess of the statutory authority or jurisdiction of the agency;

(3) Is unsupported by competent and substantial evidence upon the whole record;

(4) Is, for any other reason, unauthorized by law;

(5) Is made upon unlawful procedure or without a fair trial;

(6) Is arbitrary, capricious or unreasonable; or

(7) Involves an abuse of discretion.

In making the determination, the Court shall give due weight to the opportunity of the agency to observe the witnesses, and the expertise and experience of the particular agency. See Section 536.140.3 of the Revised Statutes of Missouri.

In conducting its review, the Court is to review the evidence in the light most favorable to Board's decision. *Gamble v. Hoffman*, 732 S.W.2d 890, 892 (Mo. banc 1987). *State ex rel. Cote v. Kelly*, 978 S.W.2d 812, 814 (Mo. App. S.D. 1998). The Court is to defer to the agency's expertise and findings with regard to the credibility of witnesses and if the evidence permits either of two (2) opposing findings, the Court should accept the findings of the administrative body. *State ex rel. Bramlet v. Ousley*, 834 S.W.2d 868, 870 (Mo. App. E.D. 1992). *State ex rel. Cote v. Kelly*, 978 S.W.2d at 814. The courts have held that the determination of a witness's credibility is the function of the administrative tribunal. *Weber v. Fireman's Retirement Sys.*, 899 S.W.2d 948, 951 (Mo. App. E.D. 1995). *Morton*

v. Missouri Air Conservation Com'n., 944 S.W.2d 231, 238 (Mo. App. S.D. 1997).

In reviewing an administrative decision, the Court may not substitute its judgment of the evidence for that of the agency and must consider all evidence in the light most favorable to the decision of the agency. *Lacks v. Ferguson Reorganized School District R-2,* 147 F.3d 718, 721 (8th Cir. 1998). Deference to the action of the agency action is even more clearly in order when interpretation of its own regulation is at issue. *Morton v. Missouri Air Conservation Com'n.,* 944 S.W.2d at 238.

If the result reached by the agency could reasonably have been reached, the Court as a reviewing Court is without authority to disturb the decision unless it was clearly contrary to the overwhelming weight of the evidence. *Campbell v. City of Columbia,* 824 S.W.2d 47, 49 (Mo. App. W.D. 1991). *Green County Concerned Citizens v. Board of Zoning Adjustment of Green County,* 873 S.W.2d 246, 258 (Mo. App. S.D. 1994).

In determining whether an administrative decision is arbitrary and unreasonable, the Missouri Supreme Court has held that the finding of an administrative body is arbitrary and unreasonable where it is not based on substantial evidence. *Edmonds v. McNeal,* 596 S.W.2d 403, 407 (Mo. 1980).

Board reminds the Court that in a hearing, procedural due process requires the administrative hearing afford the parties a fair hearing and contain rudimentary elements of fair play. *Tonkin v. Jackson County Merit Sys. Comm'n.,* 599 S.W.2d

25, 32-33 (Mo. App. W.D. 1980). *Clark v. Board of Directors of School Dist. of Kansas City*, 915 S.W.2d 766, 772 (Mo. App. W.D. 1996). Substantial evidence is merely evidence which, if true, has probative force upon the issues, i.e., evidence favoring facts which are such that reasonable men may differ as to whether it establishes them. *Fujita v. Jeffries*, 714 S.W.2d 202, 206 (Mo. App. E.D.1986). *Clark v. Board of Directors of School Dist. of Kansas City*, 915 S.W.2d at 773. If the findings of the agency are supported by substantial and competence evidence in the record, they must be affirmed. If they are contrary to the determinative undisputed facts, the decision is arbitrary and unreasonable and must be reversed. *Halford v. Missouri State Highway Patrol*, 909 S.W.2d 362, 364 (Mo. App. W.D. 1995). Substantial evidence is evidence which has probative force and from which a trier of fact reasonably could find the issues in harmony therewith. Simply put, substantial evidence is evidence which, if believed, would have a probative force upon the issues. *Tadrus v. Missouri Bd. of Pharmacy*, 849 S.W.2d 222, 225 (Mo. App. W.D. 1993). In a prior case involving Board, the Court has held that substantial means the evidence must support the discretionary determination of the Board. *Curtis v. Board of Police Com'rs. of Kansas City*, 841 S.W.2d 259, 261 (Mo. App. W.D. 1992).

B. Argument.

Lagud has raised two very limited arguments before this Court on why the decision of Board should be set aside. The first of those issues is the claim that Lagud was denied due process of law when Russell was permitted to exercise his

rights under the Fifth Amendment to a question about whether he was taking GHB on the evening of his arrest. Lagud claims that either he should have been allowed to get an answer to the question or that the entirety of Russell's testimony should have been stricken.

Lagud spends considerable time suggesting to this Court that in an administrative hearing he is entitled to a full opportunity to be heard and to defend, enforce and protect his rights. He argues that he has a right to confront and cross-examine witnesses and that he has a right to procedural due process. Board does not disagree with these general concepts of law or with the supporting cases cited by Lagud (See Substitute Appellate Brief of Respondent Jeffrey L. Lagud, pp. 12-13). In fact, Board is not going to suggest any case law that is contrary to these general principles of law.

The only true issue before this Court is whether Russell should have been required to answer the question, "Were you taking GHB on the night of September 10, 2000?" (L.F. 343). In response to a timely objection, the Board ruled that, "…any further questions concerning what may or may not have been in his possession are probably not relevant…" and "…in light of his assertion of his Fifth Amendment privilege…" the Board indicated that it would "…stop any further questioning in this regard." (L.F. 345). Thus, there are really two evidentiary issues raised. First, is the inquiry relevant and secondly, was it prejudicial to Lagud for Russell to exercise his Fifth Amendment rights.

From a factual standpoint, Lagud had already elicited evidence that Russell was in possession a date rape drug on the evening in question. On cross-examination of Carmody, Lagud inquired as to whether drugs were found in Russell's car when it was searched at the scene (L.F. 303). Carmody agreed that they "…found a number of drugs in there…", including testosterone and date rape drugs which he believed to be GHB (L.F. 303). It is clear, as suggested above, that Russell was arrested for driving under the influence (L.F. 284) and that a drug recognition expert was called to assist in the processing of Russell (L.F. 285-286). From this evidence, Board could have concluded that Russell was on GHB at the time of his arrest. It was not necessary for Russell to make a judicial admission of guilt in order for Board to reach the conclusion that he was on drugs.

Next, Lagud wants this Court to believe that the only reason the objection to the question at issue was sustained was that Russell invoked his Fifth Amendment privilege. Obviously, that is not correct. Board correctly found first that the question was not relevant to the inquiry of whether Lagud had touched the penis of Russell at a police station and whether he was dishonest in making that statement. Lagud does not even address this issue.

Beyond that, Lagud wants to suggest that he was denied the right to a full and complete cross-examination of Russell. Again, Board believes that to be incorrect. The record establishes that Lagud conducted a complete and thorough cross-examination of Russell (L.F. 340-361). Lagud inquired about the condition of Russell when he was picked up (L.F. 340), whether he was currently being

prosecuted for driving under the influence (L.F. 341), whether he had made any deals with the prosecutors in exchange for his testimony at the hearing (L.F. 342) and whether the police found drugs in his vehicle (L.F. 342), all before the question at issue was asked. After the objection to the questions was sustained, Lagud continued to cross-examine Russell and inquired about how he got in and out of the transporting wagon (L.F. 346), the giving of a breath sample (L.F. 348), other tests he was given at the police station (L.F. 348), the issue of the removal of his nipple rings (L.F. 350), his weight on the night in question (L.F. 351), the taking of the urine sample (L.F. 352), any complaints Russell made about the events of the night of his arrest (L.F. 354), his interviews following the event in question (L.F. 355), the clothing he was wearing at the time of his arrest (L.F. 356), what took place concerning the manipulation of his penis (L.F. 357) and how Lagud was holding Russell's penis and the cup (L.F. 359).

In addition to the above, from a factual standpoint, Lagud would not have a right to the relief he requests because Russell was not the only witness to say that Lagud touched the penis of Russell. This testimony was also elicited from Carmody. Board could have disregarded or stricken the testimony of Russell and still made a credibility finding that did not favor Lagud. Again, there was simply no prejudice to Lagud.

From a legal standpoint, Lagud first relies on the cases of *State of Missouri v. Blair*, 638 S.W.2d 739, 754 (Mo. 1982) and *State of Missouri v. Brown*, 549 S.W.2d 336, 341 (Mo. banc 1977) to support his position that refusal to submit to

a cross-examination must result in the striking of the direct testimony. In the *Blair* case, the Court held that, "…a state witness's invocation of his fifth-amendment right against self-incrimination during cross-examination does not *per se* violate a defendant's right to confront the witnesses against him and require striking of that testimony." *State of Missouri v. Blair*, 638 S.W.2d at 754. The Court goes on to cite the *Brown* case and holds that, "Where the witness, after his examination in chief on the stand, has *refused* to submit to cross-examination, the opportunity of thus probing and testing his statements has substantially failed, and his direct testimony should be struck out. On the circumstances of the case, the refusal or evasion of answers to one or more questions only need not lead to this result." *State of Missouri v. Blair*, 638 S.W.2d at 754. Neither case supports that the testimony of Russell should have been stricken because of his refusal to answer a single question, especially in light of the extensive cross-examination that took place in the case.

Finally, Lagud relies on the case of *State of Missouri v. Schnelle*, 7 S.W.3d 447, 453 (Mo. App. W.D. 1999). This criminal case is not applicable because it involves a situation where the named defendant testified but on cross-examination refused to answer questions on his prior criminal activity. There is nothing in this case that alters the findings of this Court in either the *Blair* case or the *Brown* case.

This issue is addressed in the case of *United States v. Brierly*, 501 F.2d 1024, 1027 (8th Cir. 1974) where the Court holds that,

> We recognize that the testimony of a witness on direct examination may be used against a defendant even though a witness asserts the privilege against self-incrimination upon cross-examination where the testimony sought to be elicited goes to collateral matters or the credibility of the witness. If, however, the witness – by invoking the privilege – precludes inquiry into the details of his direct examination so that there is a substantial danger of prejudice, the direct testimony should be stricken in whole or in part. (Emphasis added)

The cases that are referenced above are all criminal cases. Board believes they apply as suggested. However, in a civil setting, a witness' invocation of his privilege against self-incrimination justifies an inference that, if he had answered the question truthfully, the answer would have been unfavorable to him. *Matter of K.A.P.*, 760 S.W.2d 553, 554 (Mo.App. 1988). *Lappe and Associates, Inc. v. Palmen***,** 811 S.W.2d 468 (Mo.App. E.D. 1991). The only remedy would be an inference that had the question been answered it would have been unfavorable to Russell. There was already testimony that Russell admitted to having taken the drug. Granting such an inference in the present case would not alter the outcome. Board could and did reach the conclusion that Lagud improperly touched Russell even if Russell admitted being on GHB.

As suggested, whether Russell was taking GHB on the night in question might go to his credibility as a witness. Otherwise, it is collateral to the issue of whether, later at a police station, Lagud touched Russell's penis. Even assuming, but not agreeing, that it was not collateral, there is no prejudice because it was one question in an extensive cross-examination and the answer to the question was already before Board from a practical standpoint.

In this first issue, this Court should find that there is no error and this Court should affirm the decision of Board.

Point II

II. BOARD DID NOT ERR IN FINDING CREDIBILITY OF WITNESSES AGAINST LAGUD FOR THE REASON THAT THE ISSUE OF CREDIBILITY IS ONE FOR BOARD AND FOR THE FURTHER REASON THAT THIS COURT REVIEWS THE DECISION OF BOARD AND NOT THE DECISION OF THE MISSOURI COURT OF APPEALS.

A. Standard of Review.

The standard of review for this point is the same as the standard of review for Point I above and Board incorporates herein the standard of review as set out above.

B. Argument.

Board will assume that in his second point, Lagud intended to suggest that the decision of Board is not supported by substantial and competent evidence because of the issue of credibility of witnesses and for that reason should be

reversed. If Lagud actually means that the finding of the Missouri Court of Appeals is in error, there is nothing in this point for review by this Court because in an appellate judicial review of an administrative decision, the Court reviews the decision of Board and not the decision of a lower court. *Morton v. Missouri Air Conservation Com'n*, 944 S.W.2d 231, 236 (Mo. App. S.D. 1997).

Based on this assumption, Board argues that there is no error in the findings of Board. First, this Court should note that there were really only three witnesses to the key issue of whether Lagud touched or held the penis of Russell. Those three witnesses were Carmody, Russell and Lagud. No other person claims to have viewed the taking of the urine sample.

As a side issue, Board notes that Lagud does not raise for review by this Court the issue of whether his action was a violation of any policy of the Kansas City, Missouri Police Department. In previous arguments, Lagud stated that he did not touch the penis of Russell but if he did, that action did not amount to a policy violation (L.F. 743). Therefore, assuming a proper cause of action against Lagud, the only remaining issue for consideration is whether Board reasonably found the issue of credibility against Lagud.

As a second side issue, Board notes that Lagud refers extensively from the decision of the Honorable John O'Malley, Circuit Judge. Those references are not well founded because, again, this Court reviews the decision of Board and not the decision of the Circuit Court.

Board will suggest that this Court review the testimony of the three witnesses in this case. First, dealing with Russell, Board would note that Russell stated unequivocally that the officer that administered the urine test touched his penis (L.F. 339). It is unquestioned that Lagud administered the test (L.F. 488). Russell is a person that encountered the police under adverse circumstances. He was likely intoxicated at the time of the encounter and was not functioning well. However, he did, at the hearing, remember that he was arrested by the police (L.F. 335), that he was taken to the police station on 67th Street (L.F. 336) and that he was asked to give a urine test (L.F. 337). He testified that he did recall the urine sample being given (L.F. 338) and that the cup he urinated into was being held by the officer that gave the urine test (L.F. 338-339). He testified that he remembered Carmody and that Carmody was not the one who touched his penis (L.F. 339). Russell testified that he was facing a DUI charge and that the hearing on that charge had been continued (L.F. 342).

Russell appeared as a result of a subpoena (L.F. 362). Based on his testimony, Board could properly find that Russell was credible on the key issue before it regardless of his condition at the time. Lagud was a police officer and had Russell wanted to extract a favor in connection with his criminal prosecution, he could have easily testified that he did not remember what took place on the night in question. Russell is believable on the issue at hand.

Next, this Court should look at the testimony of Carmody. The Court should recall that even Lagud admits that Carmody did not take immediate action

to make a report on the actions of Lagud but rather mentioned the issue in passing later while lifting weights with his supervisor (See Substitute Appellate Brief Of Respondent Jeffrey L. Lagud, p. 7). Carmody did not initiate the investigation that led to the Charges and Specifications. Carmody was simply a witness called by the Chief of Police at the hearing. He had nothing to gain or lose by virtue of his testimony, and it would have been much easier for Carmody to simply say that he did not observe the incident. In spite of the attempt to impeach him, Carmody gave Board a very honest view of what took place.

Lagud, the last witness to the event, said that he did not touch the penis of Russell. According to his version of the events, he pulled down the pants of this handcuffed arrest and allowed the arrest to simply urinate in a cup. In fact, what Lagud said is that while holding the cup in his left hand, he reached over with his right hand and unbuttoned the pants of Russell, who was wearing a belt, by unbuttoning the top button and lowering the zipper of this person who was handcuffed with his hands behind his back (L.F. 506). This was done at a urinal that was between two walls (L.F. 113) and while Lagud was on the right of the wall (L.F. 490). Lagud does not have a good explanation for how it was that Russell's penis was removed from his pants. In this case, Lagud had a lot to lose and a great reason to lie. First, his job was at risk because the Chief of Police had recommended that Board terminate Lagud from employment. Secondly, no reputable police officer would want to be known as the cop who holds the penis of a person arrested by the police. His very reputation was at issue as well as his job.

Moreover, Lagud knew that Police Officer Ralph M. Stewart (Stewart), his training officer (L.F. 528), was going to be one of his witnesses at the hearing. Stewart testified that there had never been any training for a drug recognition officer to hold a man's penis in order to get a sample (L.F. 550-551).

To save his job and his reputation, Lagud knew that he had to take the position that he had never touched the penis of Russell, regardless of how absurd that might play out to be with the photographs of the urinal area in evidence. Lagud had a reason to lie, and Board had good reason to not believe his testimony.

On this second issue, Board believes that this brief and that of Lagud correctly spell out the law on the issue of credibility. In fact, this Court has to look no further than the statute to understand the law**.** In making the determination of credibility, the Court shall give due weight to the opportunity of the agency to observe the witnesses, and the expertise and experience of the particular agency. See Section 536.140.3 of the Revised Statutes of Missouri. The decision of Board on this limited issue is not contrary to the overwhelming weight of the evidence.

This Court must not reverse the decision of Board on the issue of credibility.

CONCLUSION

For the reasons herein set out, Board respectfully suggests that its decision be upheld.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that two (2) copies of the foregoing brief were mailed, postage prepaid, this 22nd day of January, 2004, to Mr. Steve A. J. Bukaty, Steve A. J. Bukaty, Chartered, 8826 Santa Fe Drive, Suite 218, Overland Park, Kansas 66212.

_____
Dale H. Close

CERTIFICATE OF COMPLIANCE

The undersigned, pursuant to Rule 84.06(c) of the Rules of Civil Procedure, certifies that the foregoing brief complies with the limitations set forth in Rule 84.06(b) of the Rules of Civil Procedure and that:

1. The brief contains 5177 words according to the word processing system.

2. The brief was prepared using Microsoft Word XP Professional.

CERTIFICATE OF VIRUS-FREE DISK

The undersigned, pursuant to Rule 84.06(g) of the Rules of Civil Procedure, certifies that the disk containing this brief, which is being filed with the Court, has been scanned for viruses and is virus-free.